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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
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11 NINA GURALNIK, ARKADY )  
12 KITOVER, and ILYA GURALNIK, )

13 Plaintiff(s), )

14 v. )

15 MBNA AMERICAN BANK, N.A., et )  
16 al., )

17 Defendant(s). )  
\_\_\_\_\_ )

No. C04-4543 BZ

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

18 Now before me is the motion of defendant MBNA America  
19 Bank, N.A. ("MBNA") for summary judgment, or in the  
20 alternative partial summary judgment on the complaint of Ilya  
21 Guralnik.<sup>1</sup> Although plaintiff Ilya Guralnik has not opposed  
22 the motion, he lodged with the Court a document titled  
23 "Proposed joint statement of undisputed facts supporting Ilya  
24 Guralnik OPPOSITION TO MOTION for summary judgment or in the  
25 alternative opposition to partial summary judgment on  
26 \_\_\_\_\_

27 <sup>1</sup> All properly served parties have consented to the  
28 jurisdiction of a United States Magistrate Judge for all  
proceedings including entry of final judgment pursuant to 28  
U.S.C. § 636(c).

1 complaint of Ilya Guralnik" ("opposition") approximately one  
2 month before defendant filed its motion.<sup>2</sup> (emphasis in  
3 original). As Mr. Guralnik is a pro se litigant, and this  
4 document responds to some of the arguments raised by  
5 defendants, I have considered it in ruling on defendant's  
6 motion.

7 On January 14, 2003, plaintiffs, proceeding pro se, filed  
8 a complaint against defendant MBNA and Does 1-10 in California  
9 Superior Court. On September 9, 2004, they filed an amended  
10 complaint alleging state law claims for (1) negligence, (2)  
11 infliction of emotional distress, (3) breach of contract, (4)  
12 breach of fiduciary duty, and (5) fraud, misrepresentation and  
13 dealing in bad faith with customers. All five claims arise  
14 out of an alleged transfer of funds related to a credit card  
15 account that Nina Guralnik and Arkady Kitover entered into  
16 with defendant. Plaintiffs did not effect service of process  
17 on MBNA until September 28, 2004.<sup>3</sup> MBNA removed the case to  
18 this court and moved to compel arbitration of plaintiff's  
19 claims. On May 5, 2005, I granted defendant's motion to  
20 compel arbitration with respect to the claims of Nina Guralnik  
21 and Arkady Kitover and denied the motion as to Ilya Guralnik  
22 as there was no evidence that he had ever entered into an  
23 arbitration agreement with MBNA. Defendant now seeks summary

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24 <sup>2</sup> I previously advised plaintiffs of the requirements  
25 to oppose a motion for summary judgment. See March 1, 2005  
26 Order Scheduling Court Trial and Pretrial Matters (citing Rand  
v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998)).

27 <sup>3</sup> Plaintiffs do not appear to have served the only  
28 other remaining defendant, John R. Cochran, and he is not a  
party to this motion.

1 judgment with respect to all the claims of the remaining  
2 plaintiff, Ilya Guralnik.

3 No genuine issue of material fact exists as to Ilya  
4 Guralnik's first claim for negligence. To prevail on a  
5 negligence claim, a plaintiff must establish that the  
6 defendant owed him a duty of care. See Friedman v. Merck &  
7 Co., 107 Cal. App. 4th 454, 463 (2003). As this Court has  
8 previously noted, "Under California law, except in very  
9 limited circumstances banks do not owe a duty to  
10 noncustomers." Davis v. Md. Bank, N.A., No. 00-04191 SBA,  
11 2002 WL 32713429, at \*6 (N.D. Cal. June 19, 2002) (citing  
12 Chazen v. Centennial Bank, 61 Cal. App. 4th 532, 543-45  
13 (1998); Software Design and Application, Ltd. v. Hoefer &  
14 Arnett, Inc., 49 Cal. App. 4th 472, 479, 482-83 (1996)). The  
15 duty owed by the bank is an implied term of the contract. Id.  
16 (citing Chazen, 61 Cal. App. 4th at 543). "Thus, because an  
17 account agreement is not intended to benefit third parties  
18 unknown to the bank, a third party cannot allege a claim for  
19 negligence or breach of contract against a bank." Id.  
20 (citing Chazen, 61 Cal. App. 4th at 543-45; Software Design,  
21 49 Cal. App. 4th at 482-83).

22 The account that gave rise to the claims in this lawsuit  
23 was issued solely in the name of Nina Guralnik and Arkady  
24 Kitover, and Ilya Guralnik was not a member on the account.<sup>4</sup>

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26 <sup>4</sup> Although Mr. Guralnik states in his unsworn  
27 opposition that "[d]uring some time I was a cardholder for this  
28 account," he has provided no evidentiary support for this  
statement. See Fed. R. Civ. P. 56(e); Rand v. Rowland, 154  
F.3d 952, 963 (9th Cir. 1998).

1 See Decl. of Margret Simpkins in Supp. of MBNA America Bank,  
2 N.A.'s Mot. for Summ J., or in the Alternative Partial Summ.  
3 J. on Compl. of Ilya Guralnik ¶¶ 3-5, 7-10, 12; Exs. A, B. As  
4 a third party noncustomer, Mr. Guralnik may not maintain a  
5 negligence claim based on the account at issue in this case.  
6 See Davis, 2002 WL 32713429, at \*6. Mr. Guralnik has failed  
7 to establish that MBNA otherwise owed him a duty of care under  
8 California law, and he has presented insufficient evidence to  
9 support any of the other elements of his negligence claim.  
10 See Friedman, 107 Cal. App. 4th at 463. Defendant's motion  
11 for summary judgment on Mr. Guralnik's first claim is  
12 therefore **GRANTED**.

13       Although it is not entirely clear whether Mr. Guralnik's  
14 second claim for "infliction of emotional distress" alleges a  
15 claim for intentional or negligent infliction of emotional  
16 distress, he has presented insufficient evidence to support  
17 either claim. Under California law, the elements of a claim  
18 for intentional infliction of emotional distress are: (1)  
19 extreme and outrageous conduct by the defendant with the  
20 intention of causing, or reckless disregard of the probability  
21 of causing, emotional distress; (2) the plaintiff's suffering  
22 severe or extreme emotional distress; and (3) actual and  
23 proximate causation of the emotional distress by the  
24 defendant's outrageous conduct. Cervantez v. J.C. Penney Co.,  
25 24 Cal.3d 579, 593 (1979); Ess v. Eskaton Properties, Inc., 97  
26 Cal. App. 4th 120, 129 (2002). Mr. Guralnik has presented no  
27 evidence that defendant engaged in extreme and outrageous  
28 conduct or that he suffered severe or extreme emotional

1 distress as a result of such conduct.

2 California law only authorizes emotional distress damages  
3 for negligent infliction of emotional distress in cases of  
4 physical injury. See Branch v. Homefed Bank, 6 Cal. App. 4th  
5 793, 800 (1992). Plaintiff has presented no evidence that he  
6 suffered physical injury. I therefore find that no genuine  
7 issue of material fact exists with respect to Mr. Guralnik's  
8 second claim for infliction of emotional distress, and MBNA's  
9 motion for summary judgment on this claim is **GRANTED**

10 Mr. Guralnik has failed to raise a triable issue of  
11 material fact with respect to his third claim for breach of  
12 contract. He has presented inadequate evidence to establish  
13 that he was either a party to the contract between Nina  
14 Guralnik, Arkady Kitover, and MBNA, which gave rise to the  
15 claims in this lawsuit, see Davis, 2002 WL 32713429, at \*6, or  
16 that it was made expressly for his benefit. See Cal. Civ.  
17 Code § 1559. And he has presented no evidence that he entered  
18 into any other contract with MBNA. See Reichert v. Gen. Ins.  
19 Co., 68 Cal. 2d 822, 830 (1968) (noting that the existence of  
20 a valid contract is a required element of a valid breach of  
21 contract claim); Armstrong Petroleum Corp. v. Tri-Valley Oil &  
22 Gas Co., 116 Cal. App. 4th 1375, 1391 (2004) (same).  
23 Defendant's motion for summary judgment on Mr. Guralnik's  
24 third claim is therefore **GRANTED**.

25 No genuine issue of material fact exists with respect to  
26 Mr. Guralnik's fourth claim for breach of fiduciary duty. To  
27 maintain a claim for a breach of fiduciary duty, a plaintiff  
28 must demonstrate that a fiduciary duty exists. See Mosier v.

1 Southern Cal. Physicians Ins. Exch., 63 Cal. App. 4th 1022,  
2 1044 (1998). In order for a fiduciary duty to exist, a person  
3 "must either knowingly undertake to act on behalf of or for  
4 the benefit of another or must enter into a relationship which  
5 imposes that understanding as a matter of law." Comm. on  
6 Children's Television, Inc. v. Gen. Foods Corp., 35 Cal. 3d  
7 197, 221 (1983). Mr. Guralnik has not shown that MBNA ever  
8 undertook to act on his behalf for any purpose. Nor has he  
9 presented sufficient evidence to show that a fiduciary  
10 relationship existed between him and MBNA. Defendant's motion  
11 for summary judgment on his fourth claim is therefore **GRANTED**.

12 Plaintiff's fifth claim for "fraud, misrepresentation and  
13 dealing in bad faith with customers" alleges that defendant  
14 committed fraud by mailing correspondence stating that  
15 plaintiffs' credit line was \$23,500, and plaintiffs relied on  
16 this information in undertaking certain transactions that did  
17 not go through.<sup>5</sup> See Compl. ¶¶ 34-37. The parties dispute  
18 whether MBNA ever communicated with Mr. Guralnik. However,  
19 even if MBNA did communicate with Mr. Guralnik, he has not  
20 shown that MBNA made any representations to him, nor has he  
21 demonstrated that any of the representations allegedly made by  
22 MBNA were false. See Seeger v. Odell, 18 Cal. 2d 409, 414  
23 (1941); City of Atascadero v. Merrill Lynch, Pierce, Fenner &  
24 Smith, Inc., 68 Cal. App. 4th 445, 481 (1998) (citations

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26 <sup>5</sup> Although Mr. Guralnik's fourth claim is for "fraud,  
27 misrepresentation and dealing in bad faith with customers," he  
28 has provided no authority recognizing the existence of a claim  
for "dealing in bad faith with customers." Even if such a  
claim did exist, plaintiff has not established that he was a  
customer of MBNA.

1 omitted). He has also failed to present sufficient evidence  
2 to support any of the other elements of this claim. See  
3 Seeger, 18 Cal. 2d at 414; City of Atascadero, 68 Cal. App.  
4 4th at 481. Based on the evidence presented, I find that no  
5 reasonable juror could conclude that defendant engaged in  
6 fraud or misrepresentation with respect to Mr. Guralnik, and  
7 defendant's motion for summary judgment with respect to this  
8 claim is **GRANTED**.

9 For the foregoing reasons, defendant's motion for summary  
10 judgment with respect to all claims of Ilya Guralnik is  
11 **GRANTED**. As I find no need for oral argument on this motion,  
12 the hearing scheduled for September 7, 2005 is vacated.

13 Dated: August 31, 2005

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16 Bernard Zimmerman  
United States Magistrate Judge

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